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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

SECURITIES AND EXCHANGE COMMISION,	)	
Plaintiff,	)	Case No. 2:02-CV-0039-C
	)	Declaration of Samuel Rosenthal in Opposition to the Motion to Intervene for Clarification or Modification of Rule 26(c) Protective Orders, and Support of Cross-Motion for the Return of Documents
v.	)	
MERRILL SCOTT & ASSOC.,	)	
Defendant	)	.

DECLARATION OF SAMUEL ROSENTHAL IN OPPOSITION TO THE MOTION TO AMEND THE RULE 26(c) PROTECTIVE ORDER, AND IN SUPPORT OF CROSS-MOTION FOR THE RETURN OF DOCUMENTS.

Pursuant to 28 U.S.C. §1746(1) Samuel Rosenthal declares as follows:

1. I am an attorney licensed to practice in the District of Columbia. I have been retained to represent Petitioner, Dr. Richard Gerber. Except as otherwise indicated below, this affidavit is based on my review of the filings in the litigation brought by the SEC, and the receiver appointed by the Court, in litigation in Utah involving Merrill Scott & Associates, Securities and Exchange Commission vs. Merrill Scott, Docket Number 2 CV 0039C (D Utah) ("the MSA case"), as well as the filings in this case.

2. Attached as Exhibit A is a true copy of the Complaint filed in the above-captioned case. In that complaint, the SEC alleged that clients of MSA were fraudulently induced to invest in that entity, which provided them with "professionals include[ing] attorneys, accountants, financial planners, asset managers and persons with banking expertise." Id., para. 21. The Complaint further alleged that through these professionals MSA advised clients that they could transfer assets to MSA while still maintaining control over those assets and how they were invested, while obtaining substantial tax savings. According to the Government in the MSA case, MSA actually defrauded these clients. Id., para.40.

3. At the request of the SEC, this Court appointed a receiver, David Broadbent, to manage the affairs of MSA and to prosecute any claims on behalf of MSA's clients, who has been defrauded by the MSA principals. Petitioner herein, Dr. Richard Gerber, was one of the investors in MSA.

4. In or about early 2004, the receiver indicated his intention to take the deposition of Dr. Gerber. Attached as Exhibit B is a true copy of the Protective Order entered by this Court in January, 2004, and governing any use of the deposition transcript, as well as any financial or other types of documents produced by Dr. Gerber.

5. Upon information and belief, following entry of the Protective Order, Dr. Gerber produced documents and was deposed for a full two days on February 9 and 10, 2007.

6. In December, 2004, a second Protective Order was issued in the MSA case, again protecting financial and other documents from being disclosed to anyone other than the SEC, receiver and those assisting them in the MSA case. A true copy of that Order is attached hereto as Exhibit C.

7. Prior to issuance of the second order, the receiver prepared a draft order that went substantially beyond use of the documents in the MSA case. As a result, a group of MSA investors objected on the ground that it would allow use of such materials in matters other than the SEC action.. Attached as Exhibit D is a true copy of the objections by those investors to a draft order prepared by the receiver, and which allowed documents produced by those clients to be shared with other agencies of the Federal Government, including the IRS.

8. On December 8, 2004, this Court entered an order striking out language that would have allowed the receiver to share documents with "any other department or agency of the federal government." A true copy of the Court's December 8, 2004 Order is attached hereto as Exhibit E.

9. Beginning in late 2005, the Government began issuing IRS administrative summonses to entities in connection with an investigation into Gerber's tax returns for years 1999-2005. These summons included:

November 28, 2005 summons to Feldesman, Tucker Leifer Fidell & Bank LLP, former counsel to Gerber.

December 2, 2005 summons to counsel for Gerber, Rosenau & Rosenau..

January 10, 2006 summons to Paine Webber.

January 11, 2006 summons to US Bank Corp., N.A.

June 6, 2006 summons to Wells Fargo Bank, N.A.

June 8, 2006 summons to Key Bank, N.A.

Attached as Exhibit F are true copies of the above summons.

10. Dr. Gerber, through counsel, filed Petitions to quash the summonses issued, inter alia, to Rosenau & Rosenau, Paine Webber, and U.S. Bank. See Gerber v. United States, No. 1:06MS00032, 1:05MS00516 (D.C.D.Ct). Under prevailing statutes and case law, in order to sustain the summonses, the Government had the initial burden under 26 U.S.C. § 7602 of showing that the summonses were issued for a legitimate purpose, and there had been no referral to the Department of Justice to conduct a criminal investigation.

11. In order to discharge this burden, the Government offered the Declaration of Special Agent Buck, who averred that there was no "referral" to the Department of Justice." As a result of that representation, certain parties that had been subpoenaed produced documents. A true copy of Agent Buck's Declaration dated March 17, 2006 is attached hereto as Exhibit G.

12. The Court initially determined in an opinion issued on May 29, 2007 that there was no jurisdiction as to one of the remaining two summonses, to U.S. Bank, but invited the Government to refile its Petition as to the remaining summons issued to Paine Webber. The Government did so on June 1, 2007, and again stated:

> At this time there is no "Justice Department referral," within the meaning of 26 U.S.C. §7602(d), in effect with respect to Dr. Gerber. Specifically, the IRS has not made a recommendation to the U.S. Department of Justice for a grand jury investigation or criminal prosecution of Dr. Gerber for the tax periods under examination, and the IRS is not delaying such a recommendation in order to collect additional information.

A true copy of the Government's Memorandum in Opposition to the Motion to Quash the Summons is attached hereto as Exhibit H.

13. To assist him with respect to the IRS investigation, Dr. Gerber hired Curtis, Mallet-Prevost, Colt & Mosle, LLP, where I am a partner, and another attorney, Arthur H. Boelter. On Friday, June 22nd, Mr. Boelter and I met with Special Agent Matala and Department of Justice Attorney Brian Bailey. At that meeting, both Agent Matala and Mr. Bailey indicated that they had read Dr. Gerber's deposition in this case, and also indicated their belief that Dr. Gerber should be indicted based on his deposition testimony in this case. They added that Gerber was in fact a "target" of the criminal investigation.

14. Subsequently, on July 16, 2007, I again met with Brian Bailey and Special Agent Matala. At this time, Mr. Bailey indicated that while he had read the MSA deposition given by Dr. Gerber, he had done so prior to the issuance of the Protective Order by the Judge in this case. Mr. Bailey made no mention of the fact that the initial Protective Order had been issued prior to Dr. Gerber's deposition, and he was presumably referring to the second Protective Order, issued in December, 2004, attached hereto as Exhibit C.

15. Mr. Bailey further indicated that he had read the deposition several years ago while being cross-designated as an Assistant U.S. Attorney in Utah.

16. At that second meeting, which was held on July 16, 2007, Agent Matala indicated that he had not read Dr. Gerber's MSA deposition, but had instead read the deposition of Dr. Gerber in proceedings given in his divorce action.

17. Because the comments by Messrs Bailey and Matala – including that Gerber was a target and likely to be indicted – conflicted with the representation made to the Court in the D.C. IRS summons enforcement action, I prepared a motion and presented such facts to the Court. On behalf of Dr. Gerber, we also alerted the Court to the fact that based on Mr. Bailey and Agent Matala's comments, there was apparently a violation of this Court's

Protective Orders. Shortly after those facts were brought to the attention of the Court in the IRS summons enforcement action, pending in the District of Columbia, the Government withdrew its IRS summons and asked the Court to declare the matter "moot." Attached as Exhibit I is a true copy of the United States' Response To Supplemental Memorandum of Richard Gerber in Support of Petition to Quash IRS Summons, Or In the Alternative, to Request Discovery.

18. The Government has now filed a Declaration of DOJ Attorney Bailey in this action, seeking a modification of the terms of this Court's Protective Orders. Mr. Bailey claims that he actually gave permission to the IRS to peruse the Protected Materials, but that he was "surprised" when I advised him that the Protective Orders would have precluded sharing information with the IRS. Bailey Dec., para. 6. Bailey asserts: "[t[hat interpretation surprised me, because my February 2006 review of the orders had not left me with the impression that the United States Attorney's Office for the District of Utah was so restrictively bound in the uses it could make of the information." Id., para. 6.

19. Mr. Bailey's claim that he was ignorant until the meeting with me that the Protective Orders would bar disclosures to the IRS appears to conflict with statements made by others at the Department of Justice to the Court in the District of Columbia. When called upon to explain the reason for seeking to use IRS administrative summonses, which are strictly limited in their use pursuant to 26 U.S.C. §7602, the Government claimed that such summonses were needed because Gerber had successfully thwarted access by the IRS to documents and information in the MSA case by obtaining the Protective Orders from this Court.

20. More specifically, the Government explained in the D.C. IRS enforcement action that "Gerber has taken affirmative steps in the MSA receivership to preclude the disclosure of his personal financial information to most governmental agencies, including the

IRS." See Ex. H, para. 35. The Government went on to explain how this Court had granted Gerber's request, limiting information to the IRS and other agencies, necessitating use of the IRS administrative summonses. Id.

21. Attached to the Government's Memorandum in the IRS enforcement action was a copy of the Protective Order issued by this Court, as well as this Court's ruling dated December 21, 2004, granting the investors' objections to any order that would have allowed documents to be shared with the IRS or other governmental agencies.

22. I declare under penalty of perjury that the foregoing is true and correct.

Samuel Rosenthal